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IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1969

No. [redacted] 85

GUY PORTER GILLETTE,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays this Honorable Court that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on January 9, 1970 affirming the conviction of the appellant for failure to report for induction into the Armed Forces.

Opinions Below

The District Court wrote no opinion. The opinion of the Court of Appeals for the Second Circuit was rendered on January 9, 1970 (Docket No. 34021) and appears in Appendix A, *infra*.

Jurisdiction

1. Judgment of Court of Appeals, dated January 9, 1970.

2. The jurisdiction of this Court is invoked under title 28 U.S.C. 1254 (1).

Questions Presented

1. Did appellant's claim raise a justiciable question?

2. Can a non-religious objector claim a 1-0 classification?

3. Can an objector mainly to the Vietnam war qualify as conscientious objector?

4. Is proof of intent as essential element of the crime charged?

5. Is the government required to prove classification as a part of its *prima facie* case?

Constitution, Statutes and Regulations Involved

The pertinent portions of the United States Constitution, Article 3, Section 2, Amendment 1, Selective Service Law, title 50 U.S.C., Appx. Section 456 are set forth in the Appendix at pages .

Statement

The appellant was convicted of refusal to report for induction into the Armed Forces in violation of the Selective Service Law of 1967. His sole defense was that he was a conscientious objector and that he should have

been classified as such. To prove that there was a basis in fact for the 1-A classification the government, in the absence of the jury, simply submitted the draft file of appellant in evidence. Appellant then took the stand, in the absence of the jury, and gave the substance of his stand against bearing arms. His conviction was based on humanism and was specifically directed against the war in Vietnam. The trial judge concluded that the draft board had, in effect, found that appellant's objection was to a particular war and that it, therefore, had a basis in fact for its ruling that appellant was not a conscientious objector within the meaning of the law.

Before the jury court ruled that intent need not be proved as a part of the government's case and declined to let the defendant state his intent in refusing to report. Furthermore, the court ruled that it was not necessary for the government to introduce any evidence of the classification of the appellant as a part of its *prima facie* case. The Court of Appeals affirmed conviction.

POINT I

The defendant had competence to question the legality of the war.

In communication with his draft board, appellant insisted that American intervention in Vietnam was unconstitutional and in violation of the treaty obligations of the nation. Was the appellant competent to assert this on his prosecution?

The United States Constitution, Article III, Section 2, provides in part:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . ."

It would appear, therefore, that the first inquiry of any court would be does the government have the right, in law, to call the citizen to service in the Armed Forces. Unfortunately throughout this war the Courts, almost without exception, have refused to rule on whether the war is being constitutionally waged and whether solemn treaties are being violated. This refusal denies a defendant due process of law because it bars him from introducing his basic defense.

Chief Judge Charles E. Wyzanski, Jr., of the U. S. District Court for Massachusetts, considered this question in *U. S.* v. *Sisson* (297 F. Supp. 902). The judge observed:

> "Those contentions as to the judicial power of the United States Courts are of the most serious nature. If defendant's other grounds for his amended motion in arrest of judgment do not prevail in the Supreme Court, that court will no doubt have to rule upon the new contentions with respect to judicial power, or to remand the case to this court for a ruling . . ."

It is clear, therefore, that some Judges are having second thoughts about so cavalierly brushing aside the real objections to service in the Armed Forces. This court has noted probable jurisdiction in the government's appeal in the cited case and a clear contradiction exists between this Circuit and the determination of Judge Wyzanski in the First Circuit. As Mr. Justice Douglas has observed in *Holmes* v. *U. S.*, 391 U. S. 936 and in *Hart* v. *U. S.*, 391 U. S. 956, this court has yet to decide squarely that Congress has the power to conscript in the absence of a declared war.

POINT II

The Selective Service Laws provisions on conscientious objection renders it unconstitutional.

In the statute on selective service preceding the present statute this court found that the definition of a religious objector discriminated among religions and that, therefore, it was unconstitutional as in violation of the First Amendment of the U. S. Constitution. *U. S.* v. *Seeger,* 326 F. 2d 846. The new statute eliminates the requirement that a person asserting a religious objection must believe in a Supreme Being. However, it makes it unmistakably clear that the objection must be religious, as distinguished from merely moral, philosophical, political or sociological opinions. In so doing Congress has clearly passed a law favoring an establishment of religion. Judge Wyzanski grasped the nettle courageously:

> "Earlier this opinion noted that it is practical to accord the same status to non-religious conscientious objectors as to religious objectors. Moreover, it is difficult to imagine any ground for a statutory distinction except religious prejudice. In short, in the draft act Congress unconstitutionally discriminated against atheists, agnostics, and men, like Sisson, who whether they be religious or not, are motivated in their objections to the draft by profound moral beliefs which constitute the central convictions of their beings.
>
> "This court, therefore, concludes that in granting to the religious conscientious objector but not to Sisson a special conscientious objector status, the Act, as applied to Sisson, violates the provision of the First Amendment that 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.' Torasco v. Watkins, 367 U. S. 488 . . ."

This conviction should be reversed because the indictment does not charge an offense. Again the Second Circuit disagrees with the ruling *U. S.* v. *Sisson, supra,* on this question.

POINT III

Errors in rulings on evidence require reversal.

The government's *prima facie* case before the jury consisted of proof that appellant had registered and that he had been called for induction and had failed to report. The government then rested.

The defense then moved for dismissal of the indictment upon the ground that the government had failed to prove a *prima facie* case. The motion was denied. It is submitted that the government must show in every case of prosecution for refusal to submit for induction that the defendant was classified 1-A at the time of his order to report.

Furthermore, the Court refused to permit the defendant to read his letter explaining his reasons for not appearing for induction to the jury. The government had introduced this letter into evidence. When the defense counsel pointed out to the court that intent was an issue on which the defendant could testify, the court disagreed and refused to permit any evidence on intent to be introduced. This was in clear violation of the weight of authority. *Krogman* v. *U. S.*, 225 F. 2d 220; *U. S.* v. *Johnson,* 254 F. 2d 175; *U. S.* v. *Kahn,* 381 F. 2d 824.

Wherefore, the conviction and sentence of the appellant should be reversed.

Respectfully submitted,

CONRAD J. LYNN,
Attorney for Petitioner,
401 Broadway,
New York, N. Y.

January 26, 1970.

Appendix A.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 359—September Term, 1969.

(Argued December 11, 1969 Decided January 9, 1970.)

Docket No. 34021

UNITED STATES OF AMERICA,

Appellee,

against

GUY PORTER GILLETTE,

Appellant.

Before: MOORE and KAUFMAN, *Circuit Judges;*
RYAN,* *District Judge.*

Appeal from a judgment of conviction for refusal to report for induction into the armed services, in violation of 50 U.S.C. App. § 462 (Supp. IV, 1965-68). The judgment was entered in the United States District Court for the Southern District of New York on August 25, 1969, after a one-day trial before Inzer B. Wyatt, *Judge,* and a jury. The defendant was sentenced to a term of imprisonment of two years.

Affirmed.

* Of the Southern District of New York, sitting by designation.

CONRAD J. LYNN, New York, N. Y., *for Appellant.*

HAROLD F. MCGUIRE, JR., Assistant United States Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., and Peter F. Rient, Assistant United States Attorney, New York, N. Y., of counsel), *for Appellee.*

PER CURIAM:

Guy Porter Gillette was ordered to report for induction into the armed forces on December 14, 1967. He failed to report as ordered and did not submit to induction. At his trial for violation of 50 U.S.C. App. § 462 (Supp. IV, 1965-68) his sole defense was that he should have been classified as a conscientious objector. He based his attack on the validity of his I-A classification not on any procedural irregularity but on a contention that the provision of the Military Selective Service Act of 1967 which allows exemption for conscientious objectors[1] is unconstitutional as applied to him. At a pre-trial hearing, Judge Wyatt ruled that evidence as to Gillette's belief that American intervention in Vietnam was unconstitutional, illegal or immoral would be inadmissible. Finding the induction order to be valid, Judge Wyatt limited the jury trial to the issue of whether Gillette's failure to report was knowing and willful.

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[1] 50 U.S.C. App. § 456(j) (Supp. IV, 1965-68) provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code."

Evidence derived from Gillette's selective service file and from his testimony before Judge Wyatt reveals that Gillette's beliefs were based on humanism and were specifically directed against the war in Vietnam. His position seems to include a willingness to defend his homeland if it were attacked and to fight to enforce a United Nations decision against a country accused of breaking the peace. Judge Wyatt found that Gillette's views were based "on an opinion, a feeling, a belief that the Vietnam war is immoral and unjust" and that the draft board could properly conclude that "those views did not meet the standards laid down by Congress for determining a conscientious objector." He expressly refused to rule that the board had denied the request for exemption because Gillette's views were non-religious:

"The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968); *Lichter* v. *United States*, 334 U. S. 742, 755-58 (1948); *Selective Draft Law Cases*, 245 U. S. 366 (1918). The exercise of this power to conscript and train men does not depend on the contemporaneous existence of a war. It may be exercised in time of peace. *United States* v. *Henderson*, 180 F. 2d 711, 713 (7th Cir. 1950). We reaffirm our holdings in *United States* v. *Mitchell*, 369 F. 2d 323 (2d Cir. 1966) and *United States* v. *Bolton*, 192 F. 2d 805 (2d Cir. 1951) that allegations that a particular employment of the armed services is in violation of the Constitution, international treaties or a moral code do not raise a defense to a prosecution for failure to report for induction into the armed forces. For these reasons Gillette cannot successfully challenge the legality of the war in Vietnam in these proceedings.

The contention that the conscientious objector provision of the Military Selective Service Act of 1967, 50 U.S.C. App. §456(j), is unconstitutional as applied in this case is based on the recent decision of Judge Wyzanski in *United States*

v. *Sisson*, 297 F. Supp. 902 (D. Mass. 1969), *prob. juris. noted*, 38 U.S.L.W. 3113 (U. S. Oct. 14, 1969) (No. 305). The future effect of that decision upon the application of the Act to so-called "selective" conscientious objectors and "non-religious" conscientious objectors must await a determination by the Supreme Court. In this connection we note that there was no finding below as to whether Gillette's views were "by reason of religious training and belief" or were "essentially political, sociological, or philosophical." Even assuming that his views were "religious" as that word is construed to insure the constitutionality of the Act, the Act requires opposition "to participation in war in any form." To exact such a prerequisite for exemption from induction into the armed forces is not to overstep the powers granted to Congress to raise and support armies. The mere potentiality, arising upon his induction, that Gillette would have to violate his conscientious objection to service in Vietnam is not sufficient to outweigh the application of this exercise of Congressional power to him. See *United States* v. *Henderson, supra; United States* v. *Bolton, supra. Contra, United States* v. *Sisson, supra*, at 906-11.

Gillette also asserts that there was error below in the refusal to allow him to explain his reasons for not appearing for induction to the jury and in the denial of his motion to dismiss for failure to prove a prima facie case. We find no merit in these contentions.

The conviction is affirmed.

Appendix B.

U. S. Constitution Amendment (1)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . . .

Appendix C.

Title 50 U.S.C. Appx. Sec. 456 (j)

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological or philosophical views, or a merely personal moral code. . . .